IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1935

No. 360

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS BRICK COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

Petition for Rehearing on Behalf of Respondent.

ABRAHAM R. MILLER,
Counsel for Respondent.

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Petition for Rehearing on Behalf of Respondent.

The undersigned, Illinois Brick Company, a corporation, respondent herein, respectfully petitions the Court for a rehearing of the above entitled cause and in support thereof suggests the following grounds:

I.

The Court's decision in part is based upon a *mistake of fact.*

Under Point 2 of the opinion this Court holds that as to transportation in the period between the order of October 27, 1921, and February 16, 1922, the Illinois Commis-

sion had no jurisdiction to grant reparation. In support of that holding the court says in part as follows:

> "But the order of January 11, 1921, established the rule of equality between rates for interstate and intrastate transportation from Bernice into the district and also for transportation between points within the district. On the facts found by the Interstate Commerce Commission and the law as applied by it, petitioner was required to maintain equality between these intrastate and interstate rates."

The court then states that the Interstate Commerce Commission's order of October 27, 1921, apparently intended to continue the equality between interstate and intrastate rates from Bernice and to make both rates subject to the authority of the Interstate Commerce Commission. That part of the court's opinion reads as follows:

> "There is nothing in the later report or order of October, 1921, to indicate intention on the part of the commission to authorize or permit a change of the one without a like change in the other. The purpose, by exertion of Federal authority to control both, persisted."

We respectfully submit that the last quoted paragraph is based upon a clear *mistake of fact.*

The report of October 27, 1921, clearly expresses in so many words an intention and purpose exactly contrary to that mentioned in the above paragraph of the opinion. It expressly *renounces* any jurisdiction over intrastate rates, not only by way of reparation, but also by way of prescribing or even *approving* rates for the future. The report says (Rec. 74):

> "We are asked to award reparation and to establish reasonable and nonprejudicial rates for the future.

> Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control. The complainant in No. 11314 also asks for our approval of reductions in intrastate rates from Chicago Heights, Ill., to Illinois points within the Chicago district, but the period provided by section 208 (a) of the transportation act, 1920, for our exercise of such power has now expired."

The order of the Commission consequently dealt only with interstate rates, as the opinion of this Court recognizes.

When the Commission made this report and entered its order the general increases authorized by the prior order of January 11, 1921, had been in effect for months and the rates considered by the Commission were the rates as increased by that order. Necessarily the Commission had in full mind the order of January 11, 1921, and its effect (Rec. 80). Nevertheless the Commission expressly refused to exercise jurisdiction over the rates in question.

Assuming for the moment that the Interstate Commission had power to deprive the State Commission of all future jurisdiction over state rates, and by the order of January 11, 1921, exercised that power, it is apparent that on October 27, 1921, the Interstate Commission renounced its jurisdiction. That being so, it is clear that the State Commission was again free to exercise its inherent authority over state rates. That inherent authority over state rates was at the most only suspended so long as the Federal Commission exercised its paramount power. As soon as the Federal Commission withdrew its jurisdiction the State Commission's jurisdiction again became operative.

Simpson v. *Shephard* (Minnesota Rate Case), 230 U. S. 352, 402; 57 L. Ed. 1511, 1542; 33 S. Ct. 729.

See also *Board of Railroad Commissioners of the State of North Dakota* v. *Great Northern Ry. Co.*, 281 U. S. 412; 74 L. Ed. 936; 50 S. Ct. 391, in which case the Interstate Commerce Commission, after entering an order in all respects identical with the order of January 11, 1921, insofar as it applied to intrastate rates in North Dakota, afterwards, upon request of the State Commission, renounced its jurisdiction over intrastate rates in North Dakota.

When the Illinois Brick Company filed its petition on October 28, 1922, a year subsequent to the order of October 27, 1921, it found itself in this position: It claimed that it was entitled to reparation because of the exaction of unreasonable rates upon shipments of brick commencing October 28, 1920. Unquestionably it was entitled to have its claim adjudicated in some appropriate forum. In *United States* v. *Louisiana*, 290 U. S. 70, 77; 78 L. Ed. 181, 186, 54 Sup. Ct. 28, this court, in upholding the right of the Interstate Commission to increase rates generally on the basis of a broad finding that the increases, when applied, will generally not exceed a reasonable maximum, pointed out that such action must be "accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable." The Interstate Commission had renounced jurisdiction over shipments from Bernice. What remedy was left for the Illinois Brick Company except to go to the Illinois Commission?

We respectfully submit, therefore, that the Illinois Commission had jurisdiction to grant reparation upon transportation moving between October 27, 1921, and February 16, 1922, and that the opinion of this court should be modified at least to that extent.

II.

The Court has apparently overlooked its previous decision in the Wisconsin Passenger Rate Case. That case is in conflict with the opinion herein.

The gist of the opinion herein is that the Illinois Commission had no jurisdiction to grant reparation on transportation moving subsequent to the effective date of the order of January 11, 1921, because (the opinion says):

> "By the Interstate Commerce Act and that order, the State was divested of jurisdiction, by specific order, award of reparation or otherwise, to reduce the charges based on the intrastate rates so established."

In effect, the opinion holds that an order of the Interstate Commission under authority of Section 13 (4) of the Interstate Commerce Act requiring state rates to be increased deprives the state authorities of all jurisdiction thereafter over state rates; in other words, that the Interstate Commission has the right, by virtue of Section 13 (4) to take complete unified control over interstate and intrastate commerce, even though no showing is made that the particular state commerce in question in any way affects the general level which the Interstate Commission, acting under Section 15 (a), has found to be fair to interstate commerce.

In the Wisconsin Passenger Rate case (*Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; 66 L. Ed. 371; 42 S. Ct. 232), this Court held exactly the contrary, saying (257 U. S. 590):

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining

> efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and *must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (Italics supplied.)

The situation dealt with by this Court in the Wisconsin Passenger Rate case was identical with the situation in the case at bar, namely, the effect of an order of the Interstate Commerce Commission under Section 13 (4) of the Interstate Commerce Act requiring carriers to increase the general level of state rates to correspond with the increases granted in *Ex Parte* 74 on interstate shipments.

We respectfully ask: What "appropriate discretion" to "deal with intrastate rates" is left to the state authorities under the opinion in the case at bar?

This Court in its opinion herein has not referred to the Wisconsin Passenger Rate case. If the opinion in the case at bar is permitted to stand as written, great confusion will result because of the conflict between the two opinions. Shippers and attorneys will be unable to determine what the law really is.

We respectfully submit that the quoted part of the opinion in the Wisconsin Passenger Rate case should be followed by this Court or expressly overruled.

III.

COSTS OF SUIT.

The opinion of this Court is silent as to allowance of costs. It is respectfully submitted that inasmuch as the Court has found that the respondent is entitled to recover at least a portion of the reparation award, the opinion should be modified so as to require each party to bear its own costs of the proceedings herein.

It is respectfully submitted that for the reasons above stated this Honorable Court should grant a rehearing in the case.

Respectfully submitted,

ABRAHAM R. MILLER,
Counsel for Respondent.

CERTIFICATE OF COUNSEL.

I, Abraham R. Miller, counsel for respondent, Illinois Brick Company, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay.

ABRAHAM R. MILLER,
Counsel for Respondent.